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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1050

KYLE DAVENPORT,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Sixth Circuit
and
BRIEF IN SUPPORT THEREOF

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The petitioner and appellant below was indicted in four counts, the first three of which charged the petitioner with selling and transferring to one Private Chester E. Ruggs, gasoline without requiring and receiving in exchange therefor, valid gasoline rationing coupons, in violation of Title 3, Section 2 (a) of the Second War Powers Act of 1942, and the Gasoline Rationing Regulations duly pro-

mulgated thereunder. The fourth count charged the petitioner with the same offense, the alleged purchaser of the gasoline being one Corporal Andrew L. Orfice (R. pp. 4-7).

Defendant entered a plea of not guilty to the indictment and each count thereof (R. p. 8).

At the conclusion of all the proof, the Court directed the jury to return a verdict of not guilty as to the fourth count, and the jury returned a verdict of not guilty as to said count (R. pp. 10-11, 194).

The defendant was found guilty under the first, second and third counts of the indictment and was sentenced to one year imprisonment under each count, said sentences to run consecutively, and in addition thereto, the defendant was fined $2,000.00 under each of the first and second counts of the indictment and $1,000.00 under the third count, making a total fine assessed against him of $5,000.00 (R. pp. 10-11).

The Issue of the guilt or innocence of petitioner was strongly contested in the trial court and petitioner introduced a large number of witnesses including himself in support of his plea of not guilty (R. pp. 106-189).

The case was tried to a jury and the trial court instructed the jury with respect to circumstantial evidence as follows:

> "In this case the Government relies both on direct evidence and on circumstantial evidence, and the Court charges you that presentation by the Government of circumstantial evidence is a proper way of making out a case. In many criminal cases it is the only way in which the Government can proceed in making out a case. *Criminals are not in the habit, if they can help it, of taking along witnesses to their guilt and crime. Crimes are usually performed in*

secret, and in a large number of cases the fact of guilt, if it exists, can only be established by the proof of circumstances. Proving a case by circumstantial evidence is like identifying the criminal by the tracks he left behind. Proving the tracks which show the criminal, these tracks may be very plain and may be very clear, so clear as to leave no reasonable doubt. On the other hand, they may be very weak and very obscure, so weak and obscure as to leave in your minds a reasonable doubt. To use a common illustration, if you are tracking an animal in the snow, or in the earth, that is moderately soft but not tenacious enough to retain an impression, you can know with reasonable certainty if you see a track in the snow or on the ground, whether or not it is a cow track or horse track, that is, if you know those animals and the tracks they leave; but where there is a clear impression, you did not see the animal pass, but yet there is a clear track which identifies the animal and makes you know, as reasonable minded men, that shortly before such an animal passed that way. On the other hand, the track may be very obscure, the ground may be too hard, or so soft that the track has washed out in the soft mud, or it may be obscured by the track of some other animal, and although you know the difference between the track of the horse and a cow, you cannot possibly tell from the track which animal passed that way. So it is in the criminal law, the track which the criminal left if circumstantial evidence is relied upon, may be so clear and distinct as to point beyond reasonable doubt to his guilt. On the other hand it may be so obscure or faint that it cannot and does not identify the criminal beyond a reasonable doubt.

Further, the rule applying to circumstantial evidence is that the circumstances relied upon must point so unerringly to the guilt of the accused as to exclude every other reasonable hypothesis except the hypothesis of guilt. If they do not do so, or if you believe the circumstances proven to be as consistent

with innocence as with guilt, it would be your duty, and you should acquit the defendant." (Italics ours). (R. pp. 203-205).

At the conclusion of the charge of the trial court and before the jury retired to consider of its verdict, the foregoing instructions were excepted to by counsel for petitioner in the following language: "The defendant further excepts to the statements made in your Honor's charge that the Government relies on circumstantial evidence" (R. p. 206).

The questions involved herein are:

(a) Is that part of the trial court's charge on circumstantial evidence, which is intalicized, and especially the last sentence thereof, an invasion of the province of the jury and erroneous, in that the trial court assumed that a defendant in a criminal case, is a criminal and guilty of the offense charged where circumstantial evidence is relied upon by the Government, leaving to the jury only the question of whether the criminal left sufficiently plain tracks of his guilt?

(b) Was a sufficient exception taken by petitioner to the trial court's charge on circumstantial evidence?

(c) Did the concluding paragraph of the Court's charge on circumstantial evidence, which is not italicized, cure the said italicized portion of the charge so that the trial court's charge on circumstantial evidence, taken as a whole, was not erroneous?

The United States Circuit Court of Appeals for the Sixth Circuit filed no written opinion, but by order entered February 17, 1945, erroneously held and adjudged that no *reversible error* appeared from the record and affirmed the judgment of the District Court (R. p. 213).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Circuit Court of Appeals by its decision and order of February 17, 1945, sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its Docket, No. 9830, Kyle Davenport, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by the Court, and have such further relief as to this Court may seem proper.

Dated March 10th, 1945.

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UNITED STATES OF AMERICA,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

ORDERS OR JUDGMENTS OF THE COURTS BELOW

As heretofore stated, the United States Circuit Court of Appeals for the Sixth Circuit did not render a written opinion but the order of that Court is found in the record filed herewith at page 213.

The judgment of the United States District Court for the Middle District of Tennessee, appears in the record filed herewith at page 10-12 inclusive.

II

JURISDICTION

(1) The date of the decision and judgment of the United States Circuit Court of Appeals for the Sixth

Circuit to be reviewed is February 17, 1945, and this petition has been filed within the time provided by statute (R. p. 213).

(2) The statutory provision, which is believed to sustain the jurisdiction of this Court, is United States Code, Annotated, Title 28, Section 347, Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938.

(3) Petitioner was convicted in a criminal case under certain Federal Statutes and regulations promulgated pursuant thereto, and under United States Code, Annotated, Title 28, Section 347; Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, the only method to review the decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit is by petition to this Court for the writ of certiorari.

III

STATEMENT OF THE CASE

This has heretofore been stated in the preceding petition Sec. 1 (Supra pp. 1-5) which is here adopted and made a part of this brief. It is unnecessary to review the facts appearing in the Bill of Exceptions in this case, (R. pp. 24-189), except that it may be pointed out that defendant strenuously denied the charges made against him in the indictment and supported his plea of not guilty with a large number of witnesses whose testimony, if believed, would completely exonerate petitioner of the charges made against him in the indictment.

Attention is called to the facts in this case only for the purpose of showing that the trial court erred in as-

suming the guilt of the defendant in a criminal case where circumstantial evidence is relied upon by the Government, if a proper interpretation of said instruction shows such an assumption by the trial court.

IV

SPECIFICATION OF ERROR

(1) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the charge of the trial court on circumstantial evidence, already set out in the preceding petition, did not constitute reversible error and in affirming the judgment of the United States District Court for the Middle District of Tennessee in this case (R. p. 213).

V

ARGUMENT

Summary of Argument

POINT A—The charge of the trial court on circumstantial evidence was an invasion of the province of the jury and erroneous in that it assumed a defendant in a criminal case in a trial court is guilty where the Government relies on circumstantial evidence for conviction.

POINT B—The exception taken by petitioner to the trial Court's charge on circumstantial evidence was sufficient.

POINT C—The concluding or last paragraph of the trial court's charge on circumstantial evidence did not cure the preceding part of the charge on the same subject, wherein the trial court assumed that a defendant in a criminal case was guilty where the Government relied on circumstantial evidence as aforesaid.

POINT A

The charge of the Trial Court on circumstantial evidence was an invasion of the province of the jury and erroneous in that it assumed a defendant in a criminal case in a Trial Court is guilty where the Government relies on circumstantial evidence for conviction.

It will be noted that in the first part of the charge on circumstantial evidence, the trial court makes the following observations, among others, "*Criminals are not in the habit, if they can help it, of taking along witnesses to their guilt and crime.*"; "*Proving a case by circumstantial evidence is like identifying the criminal by the tracks he left behind.*"; "*Proving the tracks which show the criminal, these tracks may be very plain and may be very clear, so clear as to leave no reasonable doubt.*"

The Court then states by way of illustration, that the kind of animal which has previously passed along a certain way can be determined by the tracks it left; that if the animal was a horse or cow, its identity or kind could be determined by anyone examining the tracks, who was familiar with these animals. The Court further stated that the tracks might be so plain it would be easy to identify the animal that had passed or the tracks might be obscure, thereby making it difficult to identify the animal or the specie of animal making them.

The Court next proceeded to apply the illustration to criminal cases as follows:

> "So it is in the criminal law, the track which the *criminal* left if circumstantial evidence is relied upon, may be so clear and distinct as to point beyond reasonable doubt to his guilt. On the other hand it may be so obscure or faint that it cannot and does not

identify the *criminal* beyond a reasonable doubt." (Italics ours) (R. p. 204).

It seems apparent from the trial court's charge that the court assumed circumstantial evidence was to be used for the purpose of legally establishing the guilt and identity of an already admitted criminal. This is shown by the Court's charge that the tracks left might be sufficiently plain to establish the guilt of the "criminal" or on the other hand they might be so obscure or faint as to fail to identify the "criminal" beyond a reasonable doubt. In other words, it is submitted that the charge presupposes and assumes an accused at all events, to be a criminal, the only question left to the jury being whether the criminal left sufficiently plain tracks to legally establish his guilt or to identify him as a criminal. It is a well settled principle of criminal law that a defendant in a criminal case in a trial court is presumed to be innocent until he is shown to be guilty beyond a reasonable doubt, instead of being assumed a criminal and therefore guilty.

Allen v. *U. S.*, 150 U. S. 551; 37 L. Ed. 1179.

An assumption by the court of any fact which is in dispute constitutes an invasion of the province of the jury.

Hicks v. *U. S.*, 150 U. S. 442; 37 L. Ed. 1137, 1141.
Allen v. *U. S.*, 150 U. S. 551; 37 L. Ed. 1179.
Blanon v. *U. S.*, 213 Fed. 320.
Menefee v. *U. S.*, 236 Fed. 826.
Conda v. *U. S.*, 166 Fed. 91.
Foster v. *U. S.*, 188 Fed. 305.
Rudd v. *U. S.*, 173 Fed. 912.

In the case of *Hicks* v. *U. S.*, *Supra*, the trial judge charged that the testimony of defendant should be viewed

in the light of his interest and the other evidence. Commenting upon this charge, this court said:

> "The obvious objection to this suggestion is in its assumption that the other witnesses whose statements contradicted those of the accused were 'telling the truth'."
>
> *Hicks* v. *U. S.*, 37 L. Ed. 1141.

Of course in the case at bar the vital and ultimate issue of fact was whether the defendant was guilty or innocent, that is to say whether he was a *criminal*, and there was abundant evidence that he was not guilty of the offenses charged.

The fact that the law was thus stated by the trial court abstractly or by way of illustration does not render it less erroneous. It is evident that the trial court intended the illustration or abstract proposition of law to be applicable to the case on trial and petitioner, otherwise, there would have been no purpose in giving same as a part of the instructions. In the case of *Allen* v. *U. S.*, *supra*, the trial court gave to the jury the following abstract proposition of law:

> "Now, what is justifiable homicide? When can a man slay another? When can he sit as a judge passing upon the law, and a jury passing on the facts, and then as a jury applying the law to those facts, and finding a verdict, and then acting again as a court and entering up judgment, and then going out as a marshal or sheriff and executing that judgment, all at the same time, determining the law, determining the facts as a judge, jury, and executioner all at the same time? This is a mighty power in the hands of the citizen. It is a mighty power, yet it is to be applied when it belongs to him because it is the law of necessity, and it is given to him because it is the

law of necessity; it is given to him because at the time he executes it in a deadly way his own life is either actually or really in deadly peril from which he cannot escape except by the use of that deadly means, or in your judgment, taking into consideration his condition, there was reasonable ground to believe there was peril."

Allen v. *U. S.*, 37 L. Ed. p. 1182.

This court held that the foregoing excerpt from the charge of the trial court was reversible error in the following language:

"To direct the attention of the jury to the contemplation of the philosophy of the mental operations, upon which justification or excuse or mitigation in the taking of human life may be predicated, is to hazard the substitution of abstract conceptions for the actual facts of the particular case as they appeared to the defendant at the time.

While it may be psychologically true that in every sane act, with whatever swiftness performed, there is involved the prior determination to do it, often inappreciably separated in time; yet when the defense in a case of homicide is justification or excuse or action in hot blood, the question is one of fact and must be passed on by the jury in view of all the circumstances developed in evidence, uninfluenced by metaphysical considerations proceeding from the court. In view of such considerations a verdict might be reached in harmony with the results of scholastic reasoning upon the nature of things in general apart from the subject-matter, and yet be unjustified by the case in the concrete which the jury were impaneled to try."

Allen v. *U. S.*, 37 L. Ed. 1183.

There can be no doubt that the charge of the trial court on circumstantial evidence was very prejudicial to petitioner. This case was called for trial on June 6, 1944 and

the taking of the testimony of the witnesses began on June 7, 1944 (R. p. 23). It is believed that this court will judicially notice that June 6, 1944 was "D Day" or the date of the invasion of Normandy. The case was therefore tried at a time when the patriotic fervor of the people of the United States was rightly very high, but it was also tried at a time when it was unusually difficult for the jury to weigh the evidence dispassionately, because of the nature of the offense with which petitioner was charged.

As stated in the case of *Hicks* v. *U. S., supra,* (37 L. Ed. p. 1141) the jury properly gives great weight to the lightest word of the judge and on account of the conditions prevailing at the time of the trial, the comments of the trial court in the charge on circumstantial evidence, was especially prejudicial to petitioner.

POINT B

The exception taken by Petitioner to the Trial Court's charge on circumstantial evidence was sufficient.

A general exception to a designated portion of a trial court's charge is sufficient in criminal cases where it is necessary or useful to cite the entire passage of the charge containing the alleged erroneous excerpts.

U. S. v. *Adkinson,* 297 U. S. 157, 80 L. Ed. pp. 555, 557.
Allen v. *U. S., supra.*
Hicks v. *U. S., supra*

This court may even in exceptional circumstances in criminal cases notice obvious errors to which no exception was taken. In the case of *U. S.* v. *Adkinson, supra,* this court speaking through Mr. Justice Stone, now the Chief Justice, said:

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

U. S. v. Adkinson, 80 L. Ed. p. 557.

POINT C

The concluding or last paragraph of the Trial Court's charge on circumstantial evidence did not cure the preceding part of the charge on the same subject, wherein the Trial Court assumed that a defendant in a criminal case was guilty where the Government relied on circumstantial evidence as aforesaid.

A palpably incorrect statement of law by the Court cannot be cured by a conflicting or contradictory one which correctly states the law, unless the erroneous instructions are expressly withdrawn.

Mills v. *U. S.*, 164 U. S. 644, 41 L. Ed. 584.

Allen v. *U. S.*, 150 U. S. 559, 37 L. Ed. p. 1182.

Drossos v. *U. S.*, 2 Fed. (2nd) 538.

Glover v. *U. S.*, 147 Fed. 426, 77 C. C. A. 450.

Washington, etc. R. R. Co. v. *Varnell*, 98 U. S. 479, 25 L. Ed. 233.

The reason for the foregoing rule is well expressed in the case of *Drossos* v. *United States, supra*, decided by the Circuit Court of Appeals, Eighth Circuit. In this case Drossos was convicted of violating the White Slave Traffic Act. The District Court, in the charge to the jury, erroneously shifted the burden of proof to the defendant. In a subsequent paragraph the trial court correctly charged however that the defendant was presumed to be innocent until proven guilty beyond a reasonable doubt. The Government contended that the charge as a whole

was correct, but the case was reversed for said error by the said Circuit Court of Appeals, the Court saying:

> "It is, of course, also true, and well settled by the authorities, that a charge to a jury is to be considered as a whole, and that if the instructions as a series correctly state the law, then though one paragraph or one phrase standing alone may be defective, it will not constitute reversible error. But that is not the rule where two instructions are directly in conflict and one of them clearly erroneous and prejudicial, such as is presented here, for the jury will assume that the instructions are all correct and will as likely follow the incorrect as the correct instruction. See Branson's Instructions to Juries, 93; 16 Corpus Juris, pp. 1054 and 1055, and cases therein cited; 14 R. C. L. 777, 45."

CONCLUSION

Under Section II of the Petition for Writ of Certiorari, petitioner assigns as a reason for the allowance of the writ the last ground set out under Section 5, Sub-section (b) of Rule 38 of this court. In the case of *New York C. R. Co.* v. *Johnson*, 279 U. S. 311; 73 L. Ed. pages 706, 711, this court granted the writ of certiorari on the same ground as assigned by petitioner herein, because of improper argument by counsel for the Plaintiff below. It is believed that a palpably erroneous charge of the court falls within the same category as an improper argument by counsel to the jury.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment of the United States Circuit Court of Appeals for the

Sixth Circuit, rendered February 17, 1945, with instructions to grant a new trial.

Respectfully submitted,

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No. 1050

KYLE DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the circuit court of appeals.

JURISDICTION

The judgment of the circuit court of appeals affirming petitioner's conviction was entered February 17, 1945 (R. 213). The petition for a writ of certiorari was filed March 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court's instruction on the subject of circumstantial evidence constituted reversible error.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and the Second War Powers Act of March 27, 1942 (56 Stat. 177) (50 U. S. C. App., Supp. III, 633), provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *

> (8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Section 1394.8152 of Ration Order 5C, issued by the Office of Price Administration pursuant to the authority of Section 2 (a) (8) of the Act of June 28, 1940, as amended, *supra,* provides (7 F. R. 9135, 9153):

> *Transfers to consumers.*—On and after November 22, 1942, and notwithstanding the terms of any contract, agreement, or commitment, regardless of when made, a dealer or distributor may transfer gasoline to a consumer, and a consumer may accept such transfer of gasoline, only in exchange for valid coupons, except as provided in §§ 1394.8154, 1394.8155, and 1394.8156.

STATEMENT

Petitioner was found guilty (R. 10) after a jury trial in the District Court of the United States for the Middle District of Tennessee on the first three counts of an indictment charging him with violations of the Second War Powers Act (*supra*) and Gasoline Ration Order 5C issued thereunder by the Office of Price Administration, in that he sold and transferred gasoline without receiving, requiring, and accepting in exchange

therefor valid gasoline ration coupons (R. 3–6).[1] Petitioner was sentenced to imprisonment for one year under each of these counts, the sentences to run consecutively, and to pay a fine of $2,000 under each of the first two counts and a fine of $1,000 under the third (R. 10–12). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the judgment was affirmed (R. 213).

Although the sufficiency of the proof to support petitioner's conviction is not challenged, we set out below a summary of the evidence as an aid to the Court in appraising the question presented by the petition:

Private Chester E. Ruggs testified that between 9 and 10 o'clock on the night of March 19, 1944, he purchased ten gallons of gasoline from petitioner at a Shell service station adjoining the Club Plantation, a road house operated by petitioner (R. 106) on the Murfreesboro Pike near Nashville, Tennessee. For this gasoline he paid $5 and did not tender, nor did petitioner demand, ration coupons in exchange. (R. 28–29, 30–31.) He further testified that two weeks prior to that date and on each of two preceding occasions he had purchased five or ten gallons of gasoline from petitioner at the same price of fifty cents a gallon, and that in each instance, petitioner, who person-

[1] The court directed a verdict of not guilty on the fourth count of the indictment (R. 6–7) on the ground that the Government had failed to prove the date of the offense alleged in that count (R. 193–195).

ally serviced his car, did not ask for or receive coupons from him (R. 29–30, 31–33). Ruggs also testified that on the March 19 occasion he was accompanied by Mrs. Ruby Brent and Miss Louise Thornton and that the latter was with him on the three prior occasions (R. 29, 31, 33). These persons corroborated Ruggs' testimony in regard to these transactions (R. 78–81, 89–90).

Testifying in his own defense, petitioner denied that he ever made any sales of gasoline to Ruggs (R. 108). He testified that in September 1942 he sold his interest in the service station to Gordon Canter, the present operator, who was at that time employed by him, and that after that date he had never put gasoline in anybody's car at the station (R. 106–107, 112). He stated that he operated the Club Plantation next door to the station (R. 106), that he was frequently around the station, in which he kept a safe, locker room, and cigarette machine, and that he paid the station's light and water bills (R. 106–107, 112). In respect of the alleged sale of gasoline to Ruggs on March 19, 1944, petitioner and others testified that he had left the Club Plantation between 7 and 8 p. m. on that date, prior to the time Ruggs had testified the sale was made (R. 107, 115, 119, 131, 136, 173, 178; see also R. 152, 185). Canter testified that petitioner had a key to the back door of the station (R. 154), and that the pay telephone was listed under the name "Davenport's Service Sta-

tion" in the June 1944 Nashville telephone directory (R. 160, 162). It was developed, on cross-examination of petitioner and by the testimony of Gordon Canter, that petitioner carried on a used-car business on a lot adjoining the station and had seven chicken houses in the back that were "all up and down" the place (R. 110, 150). Petitioner explained a statement he had made to an F. B. I. agent on September 25, 1943, that "Canter has a lease on the station and we are in business together," as referring to a whiskey business (R. 113). Petitioner admitted that he "wouldn't know how many times" he had been convicted of crimes, and stated that the "majority" of his convictions had been on liquor charges and that he had once pleaded guilty on a narcotics charge (R. 111).

In the course of his charge to the jury, the trial judge instructed them as follows on the subject of circumstantial evidence (R. 203–205):

> In this case the Government relies both on direct evidence and on circumstantial evidence, and the Court charges you that presentation by the Government of circumstantial evidence is a proper way of making out a case. In many criminal cases it is the only way in which the Government can proceed in making out a case. Criminals are not in the habit, if they can help it, of taking along witnesses to their guilt and crime. Crimes are usually performed in secret, and in a large number of cases

the fact of guilt, if it exists, can only be established by the proof of circumstances. Proving a case by circumstantial evidence is like identifying the criminal by the tracks he left behind. Proving the tracks which show the criminal, these tracks may be very plain and may be very clear, so clear as to leave no reasonable doubt. On the other hand, they may be very weak and very obscure, so weak and obscure as to leave in your minds a reasonable doubt. To use a common illustration, if you are tracking an animal in the snow, or in the earth, that is moderately soft but not tenacious enough to retain an impression, you can know with reasonable certainty if you see a track in the snow or on the ground, whether or not it is a cow track or horse track, that is, if you know those animals and the tracks they leave; but where there is a clear impression, you did not see the animal pass, but yet there is a clear track which identifies the animal and makes you know, as reasonable minded men, that shortly before such an animal passed that way. On the other hand, the track may be very obscure, the ground may be too hard, or so soft that the track has washed out in the soft mud, or it may be obscured by the track of some other animal, and although you know the difference between the track of the horse and a cow, you cannot possibly tell from the track which animal passed that way. So it is in the criminal law, the track which the criminal left if circumstantial evidence is

relied upon, may be so clear and distinct as to point beyond reasonable doubt to his guilt. On the other hand it may be so obscure or faint that it cannot and does not identify the criminal beyond a reasonable doubt.

Further, the rule applying to circumstantial evidence is that the circumstances relied upon must point so unerringly to the guilt of the accused as to exclude every other reasonable hypothesis except the hypothesis of guilt. If they do not do so, or if you believe the circumstances proven to be as consistent with innocence as with guilt, it would be your duty, and you should acquit the defendant.

ARGUMENT

Petitioner's sole contention (Pet. 4, 9–13) is that the first paragraph of the trial judge's instruction concerning the nature and weight to be accorded circumstantial evidence was erroneous and prejudicial; he argues that the instruction "presupposes and assumes an accused at all events, to be a criminal, the only question left to the jury being whether the criminal left sufficiently plain tracks to legally establish his guilt or to identify him as a criminal" (Pet. 10).[2] This contention, we submit, is clearly untenable.

[2] Petitioner also asserts that the instruction was so prejudicial as to warrant review by this Court notwithstanding that his exception at the trial was only to the court's statement "that the Government relies on circumstantial evidence" (R.

The charge as a whole (R. 195–206) fully and fairly covered the issues in the case. At the outset the trial judge summarized the allegations of the indictment (R. 195–196). He then explained the nature of the offenses charged and iterated that before the jury could convict they must find that the prohibited acts were committed "wilfully," which he defined as intentionally and with "evil design" (R. 198–199). After summarizing briefly the evidence pro and con as to each count (R. 199–201), the judge admonished the jury that they were to consider the case only on the evidence admitted at the trial (R. 201). He then explained the concepts of the presumption of innocence and reasonable doubt (R. 202–203). Speaking of the former, he explicitly instructed that the presumption abides with "Every defendant placed on trial

206). In overruling this exception, the trial judge stated that "there are a lot of circumstances in the case," that he had "presented both sides of the question," and that "If there is no circumstantial evidence in the case, the Court assumes the jury won't consider it" (R. 207). While the Government's case in chief rested largely upon the direct evidence of Ruggs and his women companions that petitioner had sold him gasoline without ration coupons, petitioner disputed this and also sought to establish that he had long since sold his interest in the service station. However, on both direct and cross-examination of petitioner and his supporting witnesses, circumstances were developed which indicated that petitioner still retained an interest in the station (see pp. 5–6, *supra*). The trial judge was therefore justified in his view that there were "a lot of circumstances in the case" and in instructing the jury as to the weight to be accorded circumstantial evidence in arriving at their verdict.

on a criminal charge" throughout the jury's deliberations; that the presumption "protects the defendant from a verdict of guilty unless, after the jury has carefully weighed all the evidence in the case and considers it, that evidence satisfies you as to the defendant's guilt, and satisfies you so clearly as to the guilt of the defendant as to leave in your mind no reasonable doubt of its truth." (R. 202.) Then followed the instruction on circumstantial evidence (R. 203–204) of which petitioner complains.

It is apparent from the two opening sentences of the paragraph which petitioner attacks (*supra*, pp. 6–8) that, as in the immediate preceding instructions concerning the presumption of innocence and reasonable doubt, the trial judge was speaking generally of "criminal cases" as a class and that his references in this portion of his instructions to "the criminal" were intended to be descriptive of persons accused of crime; in their context these words could not have been taken as referring to petitioner. Nor did the illustration of tracking an animal, which the judge used, preempt the function of the jury, as petitioner contends, by "assuming" that petitioner was guilty, leaving to the jury only the question whether he had left sufficiently plain "tracks" of his guilt to identify him as "the criminal." That the judge was referring generally only to proof of crime by circumstantial evidence, and not to the particular

case on trial, is apparent from his opening remarks in the paragraph in question, for he stated that in many criminal cases "the fact of guilt, if it exists, can only be established by the proof of circumstances"; and his illustration was obviously and aptly designed to explain to the jury the meaning and nature of circumstantial evidence, and to impress upon them the kind of strong conviction such evidence must carry before they could convict petitioner upon circumstances alone. Particularly in view of the concluding paragraph of the instruction (*supra*, p. 8), which embodied the usual statement of the rule concerning the degree of certainty of guilt required where circumstantial evidence is relied upon, and which petitioner concedes correctly stated the law in this respect (Pet. 14), it can scarcely be said that either the language or the substance of the judge's illustration is susceptible of the inference petitioner attributes to it. Read as a whole, the instructions as to the presumption of innocence, reasonable doubt, and circumstantial evidence, fairly and correctly presented to the jury the applicable legal concepts upon which they were to determine petitioner's guilt or innocence. Cf. *United States* v. *Novick*, 124 F. 2d 107 (C. C. A. 2), certiorari denied, 315 U. S. 813.

CONCLUSION

The decision below is correct, no conflict of decisions is involved, and the case presents no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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